

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

NO. 5:10-cv-02935 EJD

IN RE CELERA CORP. DERIVATIVE
LITIGATION

**ORDER DENYING PLAINTIFFS'
MOTION FOR LEAVE TO FILE MOTION
FOR RECONSIDERATION;
DENYING PLAINTIFFS' MOTION FOR
LEAVE TO FILE NOTICE OF
SUPPLEMENTAL RECORD**

I. INTRODUCTION

Presently before the Court are two matters: Plaintiffs' Motion for Leave to File a Motion for Reconsideration of the Court's Order filed April 14, 2011 (Docket Item Nos. 58, 64) and Plaintiffs' Motion for Leave to File Notice of Supplemental Record (Docket Item No. 68). Through the first motion, Plaintiffs request reconsideration of the Order Granting in Part and Denying in Part their prior Motion for Leave to Amend the Consolidated Shareholder Derivative Complaint (Docket Item No. 56, hereafter the "Order") on the grounds that (1) the class action claims Plaintiffs sought to introduce were "separate, distinct and new claims" and (2) the class action claims were the subject of litigation in other venues. See Order at 4:19-5:5. In the second motion, Plaintiffs seek to supplement their reconsideration request with subsequently obtained information. Defendants

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1 oppose both requests in written opposition (Docket Item Nos. 59, 65, 69). Due to the relation
 2 between the two motions, they are considered together for the purposes of this order. For the
 3 reasons explained below, the motions will be denied.¹

4 II. DISCUSSION

5 Civil Local Rule 7-9(a) provides the mechanism by which a party may obtain reconsideration
 6 of a prior order:

7 Before the entry of a judgment adjudicating all of the claims and the
 8 rights and liabilities of all the parties in the case, any party may make
 9 a motion before a Judge requesting that the Judge grant the party leave
 10 to file a motion for reconsideration of any interlocutory order made by
 that Judge on any ground set forth in Civil L.R. 7-9(b). No party may
 notice a motion for reconsideration without first obtaining leave of
 Court to file the motion.

11 Within the motion described in Rule 7-9(a), the moving party must make a specific showing
 12 supporting one of the following bases:

- 13 (1) At the time of the filing the motion for leave, a material
 14 difference in fact or law exists from that which was presented
 15 to the Court before entry of the interlocutory order for which
 16 reconsideration is sought. The party also must show that in the
 exercise of reasonable diligence the party applying for
 reconsideration did not know such fact or law at the time of the
 interlocutory order; or
- 17 (2) The emergence of new material facts or a change of law
 occurring after the time of such order; or
- 18 (3) A manifest failure by the Court to consider material facts or
 19 dispositive legal arguments which were presented to the Court
 before such interlocutory order. Civ. L.R. 7-9(b).

20 A motion for leave to file a motion for reconsideration may not repeat any oral or
 21 written argument previously made with respect to the interlocutory order that the party now seeks to
 22 have reconsidered. Civ. L.R. 7-9(c). “A party who violates this restriction shall be subject to
 23 appropriate sanctions.” Id.

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 25
 26 ¹ Although this Court did not issue the April 14th Order, it may nonetheless determine the
 instant motions. See Fernandez-Montes v. Allied Pilots Ass’n, 987 F.2d 278, 284 (5th Cir. 1993).

1 In the Order, the Court provided two reasons for denying Plaintiffs' request to assert
2 additional class action claims. The Court first determined the additional claims proposed by
3 Plaintiffs relied on facts distinct from those underlying the original derivative claims. See Order at
4 4:11-26. Indeed, Plaintiffs' initial claims alleged only breach of fiduciary duty and unjust
5 enrichment against the Defendants. Id. In contrast, the proposed class claims challenged a
6 subsequently contemplated merger between Nominal Defendant Celera and Quest Diagnostics, Inc.
7 Id. Accordingly, the Court found the relationship between the original claims and the proposed class
8 claims was "tangential" and "unrelated to the facts as alleged in the Original Consolidated
9 Complaint." Id. As a second ground, the Court found the proposed class claims were the subject of
10 separate litigation, particularly that before the Delaware Chancery Court. Id. at 4:26-5:5. That
11 litigation was proceeding on an expedited schedule. Id.

12 Here, Plaintiffs believe reconsideration is warranted because the Delaware action settled only
13 days after the Court issued the Order. They argue this development represents a "new material fact"
14 as referenced by Local Rule 7-9(b). Having reviewed this matter, however, the Court disagrees.
15 First, and most importantly, Plaintiffs overlook the totality of the Order. As stated above, the Court
16 precluded Plaintiffs from introducing the class action claims on two *alternate* grounds, both of
17 which provided a sufficient basis to deny Plaintiff's request to amend in their own right. Resolution
18 of the Delaware action does not nullify the Court's primary determination that the class action
19 claims are unrelated to the original claims. That finding still remains true. As such, the Delaware
20 settlement is not "material" for the purposes of reconsideration.

21 Additionally, neither settlement of the Delaware action nor the terms of such settlement are
22 "new" facts. In the Order, the Court recognized the Delaware action would soon come to an end.
23 Indeed, the Court referenced the expedited litigation schedule imposed by the Delaware Chancery
24 Court and knew it would likely cause the Delaware action to resolve before this case. Moreover, in
25 noting the existence of this other litigation, the Court must have considered the possibility of a
26

1 resolution either unfavorable or objectionable to Plaintiffs. Thus, while the Court did not explicitly
2 account for exactly when or exactly how the Delaware action would conclude in the Order, these
3 items are nonetheless implicit in the Court's reasoning. They do not require reconsideration.

4 Plaintiffs' other arguments are equally unavailing. In denying the instant request, the Court
5 is not preventing Celera shareholders from litigating their class claims. The shareholders had an
6 opportunity to do so before the Delaware Chancery Court, and as Defendants correctly indicate,
7 Plaintiffs may still object to the terms of the Delaware settlement. Moreover, Plaintiffs' attempt to
8 equate settlement of claims with an "abandonment" of claims mischaracterizes the litigation process.
9 Under Plaintiffs' reasoning, settlement of any litigation would result in an abandonment of the case.
10 Such reasoning cannot be accepted.

11 In sum, the Court finds Plaintiffs have not demonstrated that the Delaware settlement
12 represents a new material fact. For this reason, there is no basis for reconsideration.

13 III. ORDER

14 Plaintiff's Motion for Leave to File a Motion for Reconsideration of the Order filed April 14,
15 2011, is DENIED. Plaintiff's Motion for Leave to File Notice of Supplemental Record is also
16 DENIED.

17
18 Dated: May 25, 2011

19 
EDWARD J. DAVILA
United States District Judge

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

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6 **Dated: May 25, 2011**

Richard W. Wieking, Clerk

7
8 **By: /s/ EJD Chambers**
9 **Elizabeth Garcia**
10 **Courtroom Deputy**

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United States District Court
For the Northern District of California